CONNECTICUT LEGAL RIGHTS PROJECT
P.O. Box 351, Silver Street, Middletown, CT 06457
Telephone (860) 262-5030 · Fax (860) 262-5035

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JUDICIARY COMMITTEE

Testimony of Sally R. Zanger, Staff Attorney, in support of H.B. 6629.
Sen. MacDonald, Rep. Lawlor, distinguished members of the committee, I am a staff attorney with the Connecticut Legal Rights Project (CLRP), which is a legal services organization that advocates for low-income individuals in institutions and in the community who have, or are perceived to have, psychiatric disabilities. While we do not represent our clients in probate court proceedings where they have court-appointed counsel, frequently we do assist them and their counsel and we represent them on appeals of conservatorship proceedings. We certainly hear about the problems and try to help people correct them.

I urge you to enact H.B. 6629 which removes the broad discretion of the courts to appoint a guardian ad litem in (limited) cases involving any adult who is represented by counsel AND either is a respondent in a conservatorship proceeding or already has a conservator.

Guardian Ad Litem (GAL)
Connecticut General Statutes §45a-132 authorizes a court of probate or a Superior court to appoint a Guardian ad litem (GAL) for "any minor or incompetent, undetermined or unborn person ...." If it appears that one or more persons....have or may have an interest in the proceedings and one or more of them are minors, incompetent persons...etc." This is a discretionary appointment, available without notice. HB 6629 eliminates this in situations when the person is a respondent in a conservatorship proceeding or already has a conservator AND is represented by counsel. So it prevents the addition of another representative in those limited situations.
The proposed statute does not apply to any cases involving GALs for children. Children can have court appointed lawyers as well as GALs, although under the case law, the court appointed lawyer for a child has a mixed function and often also operates as a GAL. However, this proposal does not have any quarrel with that arrangement; it is crafted to affect only adults.
Rationale:

1. When a person is a respondent in a conservatorship proceeding, the issue for the proceeding is the ability of the person to make and communicate decisions about his or her life. Appointing a GAL prior to making the decision about the conservatorship prejudges that case by assuming that the person is incapable or incompetent.
2. When a person has a conservator, the conservator already should be acting for the person in those areas where he or she has been found incapable. A GAL simply adds to the conserved person's payroll and wastes either the conserved person's money, or that of the probate court administration. After the appointment of a conservator, the conservator is required to carry out any reasonable decision by the conserved individual and to make decisions according to the individual's past preferences and practices. GALs stay on retainer after a conservator has been appointed but at that time, the person already has a substitute decision maker. The conserved person thereafter bears the expense of an attorney, a conservator and a guardian ad litem. The appointment of GAL is very expensive and a waste of money.
3. There is no guidance in the statute about the duties or responsibilities of a GAL of an adult. Because GALs are most typically appointed in cases involving children, GALs

who are appointed for adults tend to argue for the "best interest" of the conserved person or respondent (the legal standard for children). "Best interest" is not a legal standard in this state for most adults. Of the several hundred times that phrase appears in state statutes, the vast majority of times refer to entities: the best interest of the state, the community, the public, corporations, sometimes classes of people (insured), or sports (boxing, racing). About equal is the number of times the phrase "best interest" refers to the best interest of minor children. "Best interest" is used for adults in only three places: for adults with developmental disabilities; in the statute authorizing involuntary sterilization and in one probate statute authorizing the probate court to decide disputes among fiduciaries. There are also a few regulations involving veterans' affairs that refer to the best interest of the veteran. The only definition of "best interest" as it applies to an adult is in the sterilization statute, and it is very specific to the issues involved there. There is no instruction in the GAL enabling statute (§45a-132) about the responsibility or duties of a GAL of an adult. This leaves the options wide open to the detriment of our clients.

A GAL, Guardian ad Litem, is a guardian for the litigation. A GAL is often appointed in one of two conservatorship circumstances: the first is a proceeding for involuntary conservatorship when the court appointed lawyer disagrees with the respondent's expressed position. In other words, when the court appointed lawyer does the judge's job, not the lawyer's job and does not want to advocate what his or her client wants (not to be conserved) so he or she asks for a GAL to advocate "best interests." (see above). "Best Interest" is not the legal standard of the conservatorship statute. The petitioner (the person or entity seeking the conservatorship) often asks for a GAL because it puts another person in the position of advocating for conservatorship and adds a court appointed voice to the petitioner's side. This is done at the expense of the respondent. Sometimes a judge appoints a GAL where there is a family dispute. This adds nothing to the case for the respondent, but takes more funds from the respondent.

Summary. The appointment of a GAL prior to a person being found incapable is prejudging the case—it says the person is incompetent. After a person has been conserved, then the conservator should be doing anything a GAL would do. If there is a question or concern about the actions of the conservator, the court should be looking into it, appointing a different conservator, or ending the conservatorship. Appointing a GAL just puts another lawyer on the respondent's or conserved person's "payroll" and depletes his or her assets. It is a waste of the respondent or conserved person's (or taxpayers') money. In practical reality, the conservator and the GAL usually work hand in hand. It is not a system of checks and balances.

Interaction of proposed Raised Bill 6629 GAL statute with Rule 1.14 Rules of Professional Conduct, Client with Impaired Capacity

A copy of the current rule, effective 1/1/09, is attached below.

The proposed statute would not impact this rule at all. According to the Rules of Professional Conduct, in most cases, a lawyer representing a person with impaired capacity would and should simply act in accordance with the person's expressed instructions. If the situation falls under (b), which is an extreme situation (**likely** to suffer **substantial** ....**harm** unless action is taken **and cannot... act in [his/her] own interest"**) then the attorney may (not must) take reasonably necessary protective action, which includes (but does not require) seeking the appointment of a

legal representative. There are several less intrusive and less legally burdensome actions available that are set out in the rule and in the commentary. In addition, even the extreme action of seeking the appointment of a legal representative includes less restrictive options than seeking the appointment of a GAL.

In a case where the client already has a conservator, the situation addressed by the proposed legislation, no appointment of a GAL would be necessary—it would be up to the attorney to decide whether the **likelihood** of harm is great enough and whether the **harm is substantial** enough to warrant consulting with the conservator. For example, if the lawyer were representing a client in a lawsuit and the client was unable to direct the lawyer or unable to respond to a settlement offer, then the conservator would be an obvious person to assist. The conservator would know the conserved person's preferences and also his or her financial situation. In such a case, if there were no conservator, then the appointment of a temporary conservator for the limited purpose of the settlement negotiation might be appropriate.

However, in a proceeding where the issue is whether or not a person should be conserved, the respondent's attorney has no obligation to (and should not) seek the appointment of a representative (i.e. a GAL). Doing so would be a breach of other ethical obligations. The client's competence is the very issue being litigated and the attorney for the respondent has an ethical obligation to represent the respondent zealously and to marshal all evidence and arguments in support of the client's position. There is no need in any of these scenarios to appoint a GAL.

Thank you for your time.

Rule 1.14. Client with Impaired Capacity (Amended June 26, 2006, to take effect Jan. 1, 2007; amended June 30, 2008, to take effect Jan. 1, 2009.)
(a) When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client is unable to make or communicate adequately considered decisions, is likely to suffer substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a legal representative. (c) Information relating to the representation of a client with impaired capacity is protected by Rule 1.6. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
(P.B. 1978-1997, Rule 1.14.) (Amended June 26, 2006, to take effect Jan. 1, 2007; amended June 30, 2008, to take effect Jan. 1, 2009.) HISTORY—2009: Prior to 2009, this section was entitled, "Client with Diminished Capacity." In 2009, in the first clause of subsection (a), "or communicate" was added after the phrase "to make," and in subsections (a) and (c) "impaired" was substituted for "diminished". Prior to 2009, subsection (b) read: "(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."